United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT
AND
JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21399

119

VIRGINIA SMITH, Et. Al.

Appellants

v.

DIPLOMAT CAB COMPANY, INC., Et. Al.

Appellees

Appeal from the United States District Court
for the District of Columbia

CLEMENT THEODORE COOPER

918 F Street, N. W.
Suite 302
Washington, D. C. 20004

ATTORNEY FOR APPELLANTS

I N D E X

QUESTIONS PRESENTED

(1) Whether one who sues as a party plaintiff in an inferior Court under an Insurance Policy for collection of benefits thereunder and who receives an adverse ruling is barred from litigating in a different capacity and a different action in a higher Court for damages due to wrongful death under the doctrine of collateral estoppel?

(2) Whether or not a party plaintiff who sues as beneficiary under the terms of an insurance policy for death benefits due to death of the insured is barred from litigation in a higher Court in a different cause of action and the capacity of the party plaintiff is that of Administratrix of the Decedent's Estate, where the causes of action arise out of the same accident which resulted in the death of the insured, under the doctrine of Res Judicata?

(3) Whether or not an admission of negligence during the oral Hearing on a Motion for

Summary Judgment is tantamount to and admission of negligence for all intents and purposes and therefore resolves the question of liability of a party plaintiff or party defendant and thus would entitle an Appellate Court to render Summary Judgment on the question of liability?

(4) Whether a failure to specially plead an affirmative defense in an Answer to a complaint constitutes a waiver of that defense and thus bars a party from raising affirmative defenses, De Novo, in a Motion for Summary Judgment?

I N D E X

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I N D E X

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,399

VIRGINIA SMITH, Et. Al.,

Appellants,

V.

DIPLOMAT CAB COMPANY, INC., Et Al.,

Appellees

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The jurisdiction of the lower Court was invoked for the reason that the amount of damages sought by Appellants, Plaintiffs below, exceeded the sum of $10,000, exclusive of interest and costs.

The jurisdiction of this Honorable Court is invoked by virtue of 28 U. S. C. 2106 (1964) pursuant to its authority to affirm, modify, vacate, set aside or reverse any judgment, decree, or order of Court lawfully brought before it for review, and may remand the cause and

direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

Appellants, plaintiffs below, filed an action for damages due to wrongful death of the husband of Appellant, wherein Appellants sought to recover, in damages, the sum of $500,000.00 in Civil Action 147-65 (J. A.). The Appellees, defendants below, filed an Answer to the Complaint denying liability and, inter alia, alleging that decedent's death was due to his contributory negligence. Appellees, defendants below, did not, anywhere in its answer, plead any other defense, other than the defense that the complaint failed to state a cause of action upon which relief could be granted. The Appellees further did not plead the affirmative defenses of estoppel or res judicata. (J. A.). On May 8, 1967, the cause was heard at Pre-Trial Conference and placed on the ready calendar. (J. A.). Notably, the Appellees did not plead, during pre-trial conference, any affirmative defenses such as collateral estoppel or res judicata. On August 2, 1967, almost three months after pre-trial conference, Appellees filed a Motion for Summary Judgment in which it alleged that there were no genuine issues of fact involved and 'for such other grounds as may be presented at oral hearing hereof! (J. A.). Appellants filed a timely opposition to the Motion for Summary Judgment. (J. A.). An Oral Hearing on the

Motion for Summary Judgment and Opposition thereto came on for Hearing and was heard on September 8, 1967 in the United States District Court for the District of Columbia.

After oral hearing on the Motion for Summary Judgment and Opposition thereto, the District Court found that the Appellees were entitled to Summary Judgment and did, in fact, render Summary Judgment for the reasons that the suit for Wrongful Death brought by the Appellants was barred due to adverse ruling received by the Appellant in another Civil Action tried in the District of Columbia Court of General Sessions, Civil Division, 222 Atl. 2d 253, entitled Virginia Smith vs. Peoples Life Insurance Company. In the latter action, plaintiff Appellant had filed a Suit to recover under a life insurance policy due to the death of her husband. In the Life Insurance Suit, Appellant sued in her own capacity as beneficiary under the terms of the policy. Because of the adverse ruling in that action, the District Court ruled, in the present action, that the action for Wrongful Death was barred under the Doctrine of Collateral Estoppel and Res Judicata. (Trans. of Hearing on Motion for Summary Judgment, J. A.).

It is from that ruling that Appellants filed a Notice of Appeal. (J. A.).

APPELLANTS STATEMENT OF FACTS

The appellant, one of the plaintiffs below is the widow of one George Smith, now deceased, who was the insured under the terms

of a life insurance policy issued by Peoples Life Insurance Company. The appellant was the beneficiary under the provisions of that policy issued on the life of her husband, George Smith, deceased. On February 28, 1964, appellants intestate, George Smith, deceased, was involved in an automobile accident on Wisconsin Avenue, N. W., in the District of Columbia. The insured died on February 29, 1964, the day after the automobile accident, due to intracerebral hemorrhage. The appellant sought to recover double indemnity benefits under the terms of the policy on the theory that "the insured met his death by accidental means and sustained bodily injuries solely through external, violent and accidental means independent of other causes." The appellant filed a claim for double indemnity benefits and the insurer refused to honor the claim for the stated reason that the insured's death did not result from external, violent and accidental means solely and independently of all other causes, within the terms of the life insurance policy.

On January 11, 1965, the appellant filed a complaint in the District of Columbia Court of General Sessions, Civil Division, Civil Action No. GS 484-65. Appellant sued in her private capacity as beneficiary under the policy in a complaint for recovery on a life insurance policy. On August 11, 1965, a Trial was held in that case and the Trial Court found for the insurer against appellant. Appellant pursued an appeal in that case in the District of Columbia Court of Appeals. That Court in Smith vs. Peoples Life Insurance Company, 222 Atlantic 2d 253, affirmed the Trial Court's finding for the insurer.

On January 19, 1965, appellant filed a complaint in the United States District Court for The District of Columbia wherein appellant sought damages due to wrongful death. In the action below, to wit, Civil Action No. 147-65, appellant sued as administratrix of the estate of George C. Smith, deceased and as administratrix and next friend of George C. Smith and Orren W. Smith, minor children of the decedent. The appellees, defendants below, filed an Answer to the complaint, but in their Answers, did not specifically set forth the affirmative defenses which they now assert on Appeal. (See J. A.).

The appellees filed a Motion for Summary Judgment and appellants filed an opposition thereto. During theOral Hearing on the Motion, the appellees conceded that they were negligent and addressed themselves to the arguments based on affirmative defenses which appellees did not specifically plead in their Answers. (J. A. Transcript of Oral Hearing on Motion for Summary Judgment). After hearing arguments for both parties, the Trial Court ruled in favor of the appellee on the ground that the Motion for Summary Judgment was maintainable for the reason that the issue in the present suit was adjudicated in a previous action and thus, the present suit was barred under the doctrine of Collateral Estoppel.

It is from that ruling that the appellants perfected this Appeal.

SUMMARY OF ARGUMENT

1. One who sues as a party plaintiff in an inferior Court under an Insurance Policy for collection of Insurance Death Benefits and who receives an adverse ruling is not barred from litigating in a different capacity and in a different action is a higher Court for damages due to wrongful death under the Doctrine of Collateral Estoppel. The Doctrine is inapplicable.

2. A party plaintiff who sues as beneficiary under the terms of an Insurance Policy for benefits due to the death of the insured is not barred from litigating in a different capacity even though the cause of action arose out of the same accident which resulted in the death of the insured under the Doctrine of Res Judicata. The doctrine is inapplicable.

3. An oral admission of negligence during the Hearing on a Motion for Summary Judgment is tantamount to an admission of negligence for all intents and purposes and thus entitles a Court of Appeals to render Summary Judgment on the question of liability.

4. A failure to specially plead an affirmative defense in an answer to a complaint constitutes a waiver of that defense and thus bars a party from raising that defense, de novo, in a Motion for Summary Judgment.

ARGUMENT

I.

ONE WHO SUES AS A PARTY PLAINTIFF IN AN INFERIOR COURT AS A BENEFICIARY UNDER AN INSURANCE POLICY AND WHO RECEIVES AN ADVERSE RULING THEREIN IS NOT BARRED FROM LITIGATING IN A DIFFERENT CAPACITY IN AN ACTION FOR DAMAGES DUE TO WRONGFUL DEATH UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

The Appellant herein filed an action in the District of Columbia Court of General Sessions against Peoples Life Insurance Company seeking proceeds under terms of an Insurance Policy in which Appellant was named beneficiary exclusively. As set forth in the statement of facts, appellant received an adverse ruling in that action. Appellant was subsequently appointed as Administratrix of the Estate of her deceased husband, George Smith, and in January, 1965 filed a civil action in the United States District Court as administratrix of the Estate of George Smith, seeking damages for wrongful death against the Appellee, an entirely different defendant. The District Court suit was dismissed on Summary Judgment for the reason that the suit was barred by the doctrine of collateral estoppel. The question raised then is whether the doctrine of collateral estoppel has application to the District Court suit seeking damages for wrongful death.

Notably, the Trial Court felt that, due to the doctrine of collateral estoppel, appellant's suit was barred. It must be remembered, however, that Estoppel is an affirmative defense and will not be ordinarily be considered on a Motion to Dismiss the complaint unless it appears affirma-

tive on the face of the complaint. Sidebotham v. Robison, 216 F. 2d 816 (C. A. 9th, 1954); Latta v. Wester Inv. Co. 173 F. 2d 99 (C. A. 9th, 1949); Suckow Borax Mines Consol. vs. Borax Consol. 185 F. 2d 196 (C. A. 9th, 1950). Here, there are no facts which affirmatively appear on the face of the complaint and consequently, appellees were barred from asserting, by Motion for Summary Judgment, the doctrine of collateral estoppel. There are other reasons why the Trial Court erred in dismissing the Appellant's complaint. The affirmative defenses of Res Judicata and Collateral Estoppel were not raised in Appellee's answer nor did the Trial Court have before it, the Record in Smith vs. Peoples Life Insurance Company. Logically, a Court may not dismiss an action on Motion on the ground of Res Judicata or any other affirmative defense where no answer has been filed raising the defense and the record in the prior case is not in evidence. Additionally, the defense of Res Judicata may not be raised by motion and such a Motion may not be treated as a Motion for Summary Judgment, at least where genuine issues of material facts appear to exist as to matters alleged in the complaint. Guam Inv. Co., Inc. v. Central Bldg., Inc. 288 F. 2d 19 (C. A. 9th, 1961). As a general rule, a Court in one case will not take judicial notice of its own records in another and distinct case even between the same parties, unless the prior proceedings are introduced in evidence. National Surety Co. v. U. S. 29 F. 2d 92 (1928); Paridy Caterpillar Tractor Co. 48 F. 2d 166 (1931); 96 A. L. R. 937; Funk v. Commissioner of Internal Revenue, 163 F. 2d 796 (1947); 20 Am. Jur. 105, Evidence, sec. 87. The reason for the above rule is that the

decision of a Court must depend upon evidence introduced. If the Courts should recognize judicially facts adjudicated in another case, they make those facts, though unsupported by evidence in the case at hand, conclusive against the opposing party; while if they had been properly introduced they might have been met or overcome. Thus, on a plea of Res Judicata or Collateral Estoppel, a Court cannot judicially notice that the matters in issue are the same as those in a former suit. Such matters must be specifically pleaded and proved. Paridy v. Caterpillar Tractor Co., supra.

Analytically, in the General Sessions suit, Appellant sued in her own right as beneficiary under the terms of an Insurance policy. In the action now before the Bar of this Court, appellant sued in an entirely different capacity, that is, as Administratrix of the Estate of George Smith, deceased. Further, the defendants in both actions were completely different defendants. Thus, the fact that a judgment in General Sessions Court, adverse to the Appellant, did not and does not Bar her present suit for damages due to wrongful death. Succinctly stated, the doctrine of collateral estoppel is operative where the second action is between the same parties who were parties to the prior action, whether the second action is brought by the plaintiff or the defendant. Restatement of Judgments, Ch. 3, sec. 68, pp. 294. All parties in the present suit are entirely different and enjoy a completely different status for purposes of litigation.

Appellant further contends that the mere fact that an issue of law was litigated and determined in an action does not necessarily pre-

clude her from litigating the same question of law in the present action between the parties based upon a different cause of action. The Judgment in the prior action is not conclusive on the question of law if the subsequent action not only is based upon a different cause of action but also involves a subject matter different from that which was involved in a prior action. Restatement of Judgments, Ch. 3, Sec. 70 (3), pp. 322. The more liberal view seems to lend support to Appellant's contentions here. That view is - where a Court has incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, but determined the matter incidentally for purpose of deciding the case before it, the judgment is not conclusive in a subsequent action brought to determine the matter directly. Restatement of Judgments, Ch. 3, Sec. 71, pp. 326. General Sessions Court would not have had jurisdiction to determine the present suit for the reason, that that Court had no jurisdiction to entertain actions for wrongful death were the damages exceeded the sum of $10,000 or more.

In view of the foregoing, it is conclusive that a party plaintiff who sues in an inferior Court as beneficiary under an Insurance Policy for collection of benefits thereunder and who receives an adverse ruling in that action is not barred from litigating in a different action and in a different capacity under the doctrine of Collateral Estoppel.

II.

ONE WHO SUES AS A PARTY PLAINTIFF FOR COLLECTION OF BENEFITS UNDER AN INSURANCE POLICY IS NOT BARRED FROM LITIGATING AS A PARTY PLAINTIFF IN A DIFFERENT ACTION AND IN A DIFFERENT CAPACITY, ALTHOUGH THE CAUSE OF ACTION AROSE OUT OF THE SAME TRANSACTION, UNDER THE DOCTRINE OF RES JUDICATA.

In Appellee's Motion for Summary Judgment, the contention was advanced that Appellant's suit was barred by the doctrine of Res Judicata. Questionably, the doctrine must be exposed to analysis. The doctrine of Res Judicata is that a right, question, or fact which is a ground of recovery, and which was distinctly put in issue and directly determined by a Court of competent jurisdiction, cannot be disputed in a subsequent suit between the same parties or their privies, and, though the second suit is on a different cause of action, the right, question or fact determined in the first action must be taken as conclusively determined between the same parties and their privies, so long as the judgment in the first suit remains unmodified. Otis & Co. v. S.E.C., 85 U. S. App. D. C. 122, 176 F. 2d 34, rev. 70 S. Ct. 89, 338 U. S. 843 (1949). The parties were not the same in both actions nor was the cause of action the same. The General Sessions suit was one seeking payment under terms of an insurance policy. The present suit is one brought by the Administratrix seeking damages due to wrongful death. In both actions, the defendants are entirely different parties and in both actions, while the plaintiff is physically and spiritually one and the same persons, the plaintiff sued in different capacities. For

other reasons, the doctrine must fail in it's application here. The doctrine of Res Judicata is an embodiment of a public policy and must, at time, be weighted against competing interest and must on occasions, yield to other policies such as JUSTICE. Spilker v. Hankin, 88 U. S. App. D. C. 206, 188 F. 2d 35 (1951). Inorder to constitute a former adjudication, which can be pleaded in bar of a recovery, the judgment pleaded must be in an action between the same parties or their privies. Strong v. Grant, 2 Mackey 218, 13 D. C. 218 (1883). If Appellant filed suit in General Sessions Court as a party plaintiff seeking payment under terms of an insurance policy under which she was named beneficiary, how then, can the doctrine apply in the present suit where appellant sues as Administratrix of the Estate of George Smith, deceased, seeking entirely different damages and under a completely different theory or cause of action? This Court has held time and time again, that a judgment rendered in the first suit is not conclusive as between parties on facts and cause of actions different from those originally pleaded. Vincent v. U. S., 64 U. S. App. D. C. 178, 76 F. 2d 428 (1935). The defendants in both suits were not in privity with each other so as to avail themselves of the doctrine of res judicata or collateral estoppel. Neither does the foregoing analysis apply to the Appellant. The test of privity is whether the present Appellant or Appellee participated in control of the first action, individually or in cooperation with others, to establish and protect some proprietary or financial interest of his or her own. Uebersee Finanz-Korporation, A. G. Liestal, Switzerland v. Brownell, 171 F. Supp. 420 (1954).

For the reasons aforestated, Appellant again asserts that Appellant's present suit seeking damages for wrongful death of the decedent was not barred by the doctrine of Res Judicata.

III

AN ADMISSION OF NEGLIGENCE DURING THE ORAL HEARING ON A MOTION FOR SUMMARY JUDGMENT IS TANTAMOUNT TO AN ADMISSION OF LIABILITY AND THEREFORE RESOLVES THE QUESTION OF LIABILITY FOR WHICH AN APPELLATE COURT MAY GRANT SUMMARY JUDGMENT, DE NOVO, IN PART.

Appellees, during the Oral Hearing on the Motion for Summary Judgment, made oral admissions of liability in Open Court and must therefore become bound by it's own admission as to liability in the Wrongful Death Action seeking damages. On page 3 of the Transcript of the Hearing on Motion for Summary Judgment, Appellees, through Counsel, stated:

> " For the purposes of this argument only we will concede negligence and suggest to the Court in our Motion that the second question in the case, namely, whether or not the deceased died wrongfully or died of natural causes, has been judicially determined and therefore the plaintiff is estopped to further assert this claim against the defendants. " (J. A.).

The question presented then, is whether or not the oral admissions made in Open Court by Counsel are sufficient to bind the Principal. An admission is defined, in the law of evidence, as a concession or voluntary acknowledgement made by a party of the existence of certain

facts. 31 A Corpus Juris Secundum 694, sec. 270. Admissions are of two categories, namely, Extrajudicial admissions (meaning those admissions made out of the presence of the Court), and Judicial Admissions (meaning those admissions made in Open Court). The precise form which the admission may assume is immaterial, as any act or statement which may fairly be interpreted as an admission against interest on a material matter of Court inquiry may be shown in evidence. Pewitt v. Pewitt, 192 Tenn. 227, 240 S. W. 2d 521 (1951). Thus, a Judicial Admission may include a formal disclosure made before the Court by a party or his Attorney. Snittjer Grain Co. v. Koch, 246 Iowa 1118, 71 N. S. 2d 29 (1955); Dunbar v. Dunbar, 80 Me. 152, 13 A. 578 (1888); Pewitt v. Pewitt, supra. Appellees, through Counsel, cannot be allowed to pursue Summary Judgment on some other ground while conceding liability for the question of liability, while always open to inquiry by the Court, was not squarely before it. Appellees voluntarily made an out and out admission of liability.

This Court has held some years previous to this suit, that where an Attorney employed to present a claim to a person makes certain admissions of fact, they are competent evidence against his client, even in a subsequent suit between the client and the person to whom they were made. Shoemaker Co. v. Munsey, 37 App. D. C. 95 (1911); Rule cited in Berry v. Littlefield, Alvord & Co., 54 App. D. C. 195, 296 F. 285 (1924). Courts have held that an Attorney is such an agent of his client that his declarations made

during the course of his employment may be offered against his principal. W. T. Harvey Lumber Co. v. J. M. Wells Lumber Co., 104 Ga. App. 498, 122 S. E. 2d 143 (1961).

The rule has even greater signigicance where Counsel, while pursuing one legal theory for purposes of successfully prosecuting a Motion for Summary Judgment, makes an Open, Oral Admission of Liability. The rule is well settled that parties are bound by formal admissions of their Counsel in an action. Dick v. Drainage Dist. No. 2 of Harvey, Reno and McPherson Counties, 358 P. 2d 744 (1961). The rule has great merit inasmuch as most admissions made by an Attorney are considered persuasive. Berry v. Littleford, Alvord & Co., supra; Ball vs. Barnhurst, 20 App. D. C. 257, 270 F. 693; Smiths America Corp. v. Bendix Aviation Corp. 140 F. Supp. 53 (1956); Horton v. Zimmer, 32 App. D. C. 217 (1908).

The conclusion is therefore inescapable that an admission of negligence during the oral hearing on a Motion for Summary Judgment is an Admission of Liability for which this Honorable Court may Grant Summary, De Novo, in part on that question.

IV.

A FAILURE TO SPECIALLY PLEAD AN AFFIRMATIVE DEFENSE IN AN ANSWER TO A COMPLAINT CONSTITUTES A WAIVER OF THAT DEFENSE AND THUS BARS A PARTY FROM RAISING THAT DEFENSE, DE NOVO, IN A MOTION FOR SUMMARY JUDGMENT.

As Appellant argued elsewhere in this brief, the Doctrine of

Res Judicata is an affirmative defense which must, pursuant to Rule 8 (c), Federal Rules of Civil Procedure, be pleaded affirmatively inorder to apprise the opposing party that such a defense will be interposed at trial. Appellee did not affirmatively plead Res Judicata no where in it's answer. Appellee filed the usual and routine answer. Thus the defense was waived and Appellee could not raise the defense by way of Motion for Summary Judgment under limitations enunciated in Rule 12 (b), Federal Rules of Civil Procedure, and therefore that failure must be deemed a clear waiver. Where a party fails to raise an affirmative defense in his or her answer but merely makes a general denial, the defense is waived under the provisions of Rule 12 (h) of the Federal Rules of Civil Procedure. Crowe v. Cherokee Wonderland, Inc. ____ F. 2d ____ (1967), 11 Fed. Rules Service 2d 12h. 1, Case 3. Rule 12 (h) of the Federal Rules of Civil Procedure specifically provides, that a failure to affirmatively raise all defenses and objections, constitutes a waiver thereof.

Appellees may erroneously assert the proposition that their failure to plead res judicata and collateral estoppel did not preclude them from raising those defenses, for the first time, on motion for Summary Judgment under Rule 12 (b) of the Federal Rules of Civil Procedure. It is to be noted, however, that Rule 12 (b) of the Federal Rules of Civil Procedure, in substance provides that, a defense to a claim for relief in any pleading shall be asserted in a responsive pleading thereto, if one is required, except, that the

following defenses may, at the option of the pleader may be made by Motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a ground upon which relief can be granted, (7) failure to join an indispensable party; and if, on a Motion asserting they defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the Motion shall be treated as one for Summary Judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present material made pertinent to such motion by Rule 56. Appellant calls to the attention of this Honorable Court the fact that Rule 12 (b) does not list, anywhere in it's language, the defenses of Res Judicata or Collateral Estoppel. See Guam Investment Co. v. Central Bldg., Inc. supra.

In veiw of the foregoing argument and reasons and authorities cited in support thereof, it is reasonable to conclude that a failure to specially plead an affirmative defense in an Answer to a complaint constitutes a waiver of that defense and thus bars a party from raising that defense, de novo, in a Motion For Summary Judgment.

CONCLUSION

Appellees having pursued a Motion for Summary Judgment on the theories that Appellant's suit was barred by the doctrine of Res Judicata and Collateral Estoppel, neither doctrine having clear

application to the present action for Wrongful Death and Appellees, through Counsel, having orally admitted negligence, the conclusion is inescapable that a Motion for Summary Judgment did not attain under Rule 56 of the Federal Rules of Civil Procedure and thus, Appellant prays this Honorable Court to Reverse the Judgment entered by the District Court.

RESPECTFULLY SUBMITTED

Clement Theodore Cooper
Attorney for Appellant
918 F Street, N. W. (302)
Washington, D. C. 20004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

VIRGINIA SMITH, 1
As Administratrix of
Estate of George C. Smith, Dec.
4706 - 5th Street, N. W.
Washington, D. C.

&

VIRGINIA SMITH, 2
As Admn. and next friend of
GEORGE C. SMITH, minor
ORREN W. SMITH, minor
4706 - 5th Street, N. W.
Washington, D. C.

Plaintiffs

vs.

JOHN WESLEY HOOD, 1
605 Harvard Street, N. W.
Washington, D. C.

Defendant

&

DIPLOMAT CAB COMPANY, INCORPORATED
a corporation
2336 Georgia Avenue, N. W.
Washington, D. C.

Defendant

Civil Action No. 147-65

COMPLAINT FOR DAMAGES
WRONGFUL DEATH

1. On or about May 11, 1964, plaintiff was duly appointed administratrix of the goods, chattels and credits of George C. Smith, deceased, by the Probate Court, United States District Court for the District of Columbia, Administration Number 111,259, and plaintiff thereupon qualified as such administratrix and is acting as such.

2. The amount involved exceeds the sum of $10,000, exclusive of interest and costs and the jurisdiction of this Court is thereby invoked. Defendant 1 is an adult resident of the District of Columbia and is a citizen of the United States of America. Defendant 2 is a corporation, duly organized under the laws of the District of Columbia and is doing business therein as an incorporated taxi-cab association.

3. On or about February 28, 1964, while plaintiff's decedent was operating his automobile in a careful and prudent manner, the defendant 1, who was then and there operating his automobile, under color of authorization, i.e., Diplomat Cab Association, Incorporated, in a reckless and negligent manner thereby causing a collision on the aforesaid date.

4. That the plaintiff's decedent was operating his automobile in a careful and prudent manner at that time and was in no way contributorily negligent.

5. That as a result of said accident and the gross negligence of the defendant's 1 and defendants 2, by and through it's agent, defendant 1, plaintiff's decedent was made to suffer severe, critical and fatal bodily injuries from which he died on February 29, 1964.

6. That as a result of said negligence on the part of the defendants herein named, plaintiff sustained numerous bodily injuries, in addition to last medical expenses and funeral bills.

WHEREFORE, Plaintiff prays judgment in the sum of $300,000.00 and for costs of this action.

COUNT II

1. Plaintiff 2 sues as administratrix of the Estate of George C.

Smith, deceased, and as next friend of two minor children of plaintiffs' decedent and repeats each and every allegation contained in Count I of this complaint as though fully recited at length and incorporates the same by reference and makes the same a part hereof.

2. As a result of the gross negligence of the defendants causing the wrongful death of the plaintiffs' decedent, upon whom two minor children depended for support, damages are sought for the loss of support, affection, and for mental pain and anguish.

WHEREFORE, Plaintiff 2 prays judgment in the sum of $200,000.00.

Clement Theodore Cooper
Attorney for Plaintiffs
918 F Street, N. W. (302)
Washington, D. C. 20004
EXecutive 3-3900

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES!

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA SMITH, 1
As Administratrix of
Estate of George C. Smith, Deceased
4706 - 5th Street, N. W.
Washington, D. C.
and

VIRGINIA SMITH, 2
As Administratrix and next friend
of George C. Smith, minor,
Orren W. Smith, minor
4706 - 5th Street, N. W.
Washington, D. C.

Plaintiffs

vs

JOHN WESLEY HOOD, 1
605 Harvard Street, N. W.
Washington, D. C.

and

DIPLOMAT CAB COMPANY, INC.
a corporation
2336 Georgia Avenue, N. W.
Washington, D. C.

Defendants

Civil Action No. 147-65

ANSWER OF DEFENDANT DIPLOMAT CAB COMPANY

First Defense

The complaint fails to state a cause of action against this defendant upon which relief can be granted.

Second Defense

This defendant has no knowledge of the allegations set forth in paragraph one and, therefore, they are neither admitted nor denied. This defendant admits that the corporate defendant is licensed to do business in

this jurisdiction. This defendant admits that an accident occurred involving plaintiff's deceased and a taxicab owned and operated by defendant Hood at the time and place alleged. This defendant denies all allegations of negligence on its part and pleads the sole or contibutory negligence of plaintiff's deceased. All allegations not specifically answered are denied.

HOLLOWELL AND PITTS

By s/
Vaden S. Pitts

CERTIFICATE

This is to certify that a copy of the foregoing Answer was mailed, postage prepaid, this 27th day of January, 1965, to Clement Theodore Cooper, Attorney for Plaintiffs, 918 F Street, N. W., Washington, D. C.

s/
Vaden S. Pitts

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA SMITH, 1
As Administratrix of
Estate of George C. Smith, Deceased
4706 – 5th Street, N. W.
Washington, D. C.

and

VIRGINIA SMITH, 2
As Administratrix and next friend
of George C. Smith, minor
Orren W. Smith, minor
4706 - 5th Street, N. W.
Washington, D. C.

Plaintiffs

vs

Civil Action No. 147-65

JOHN WESLEY HOOD, 1
605 Harvard Street, N. W.
Washington, D. C.

and

DIPLOMAT CAB COMPANY, INC.
a corporation
2336 Georgia Avenue, N. W.
Washington, D. C.

Defendants

ANSWER OF DEFENDANT JOHN WESLEY HOOD

The defendant Hood hereby adopts and incorporates by reference the Answer heretofore filed by the defendant Diplomat Cab Company.

HOLLOWELL AND PITTS

By s/
Vaden S. Pitts

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CERTIFICATE

This is to certify that a true copy of the foregoing was mailed, postage prepaid, this 2nd day of February, 1965, to Clement Theodore Cooper, Esquire, Attorney for the Plaintiffs, 918 F Street, N. W., Washington, D. C.

s/
Vaden S. Pitts

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

VIRGINIA SMITH, et al	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Civil Action No. 147-65
	)	
JOHN WESLEY HOOD	)	
	)	
&	)	
	)	
DIPLOMAT CAB COMPANY, INC.	)	
	)	
Defendants	)	

INTERROGATORIES

TO: JOHN WESLEY HOOD, Defendant
c/o Vaden Pitts, Esquire
1513 P Street, N. W.
Washington, D. C

The following Interrogatories are propounded to you in accordance with the provisions of Rule 33 of the Federal Rules of Civil Procedure. You are required to answer each Interrogatory separately and fully, in writing, under oath, and serve a copy of your Answers upon the Plaintiff within fifteen days after the delivery of the Interrogatories to you.

1. What is your name?
2. State your residence address, place of employment and type of occupation?
3. When and where were you born?
4. Please state your marital status.
5. Were you the owner or driver of a Diplomat Cab on February 28, 1964?
6. Was the cab registered in your name?
7. On February 28, 1964, were you operating a Diplomat Cab at or near the vicinity of 1700 block of Wisconsin Avenue, N. W.

in the District of Columbia?

8. State the make, model, year of your cab and give the cab number.

9. State whether the vehicle in question (dab) was involved in any other accident pride or subsequent to the date of the accident on February 28, 1964?

10. State the names and addresses of all passengers riding in your vehicle at the time of the accident? Please attach a photo copy of your manifest for the date February 28, 1964.

11. Were you in possession of a valid driving permit on February 28, 1964?

12. State: (a) The exact portion of the highway where the accident occurred; (b) The position of the respective vehicles; (c) Distances from you when you first observed the other vehicle; (d) When any where you applied your brakes; (e) Distance travelled between point brakes were applied and point of impact; (g) positions of vehicles after impact; (h) What part of your vehicle came in contact with what part of our vehicle.

13. State the names and addresses of all persons known to you to possess personal knowledge of relevant facts to the accident.

14. State the exact date, time, and place of the accident, and describe in detail how you claim the accident occurred.

15. What was the condition of the weather on February 28, 1964?

16. State the nature of the road with reference to any depressions, curves, obstructions or hills in the general area of the accident.

17. State whether any traffic lights, traffic signs or any other traffic controls existed at the place of the accident, and if so, what were the indications of the control.

18. Where, with reference to the point of impact, was defendant's vehicle when defendant driver first observed the plaintiff deceased before or after the accident, giving the approximate distance from the point of impact to the front or rear of defendant's vehicle?

19. Where, with reference to the point of impact was the deceased, when the defendant driver first observed him?

20. If the defendant driver observed the deceased, pride to the impact, state what further observation, he made of said deceased up to the point of impact and state what he observed with reference thereto?

21. Did the defendant apply his brakes within 100 feet as he approached the point of impact? If so, state how many feet his vehicle was from the point of impact?

22. Did the defendant's vehicle leave any skid marks on the road? If so, state where they were located and give their length.

Clement Theodore Cooper
Attorney for Plaintiffs
918 F Street, N. W. (302)
Washington, D. C. 20004

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 1966, I mailed, postage

prepaid, a copy of the foregoing Interrogatories to Law Offices, Hollowell and Pitts, 1513 P Street, N. W. Washington, D. C. 20005, attorneys for defendant.

Clement Theodore Cooper
Attorney for Plaintiffs

(e) none

(f) same as (b)

(g) left rear fender.

13. None

14. Friday, February 28, 1964, 2:40 p.m. I had stopped in the curb lane to pick up a passenger. Before the passenger could get to the cab to get in, the other cab struck my cab in the rear. The other driver stated that he had become dizzy and therefore struck my cab. When the police came the other driver was taken to Georgetown Hospital. The other driver died Friday night at the hospital.

15. Raining and snowing.

16. Small incline.

17. None.

18. Defendant did not see deceased's vehicle until the vehicle operated by deceased had struck the defendant's vehicle in the rear.

19. See 18.

20. Did not observe.

21. N/A

22. No.

JOHN WESLEY HOOD

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 12th day of January, 1966.

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Notary Public

My Commission Expires My Commission Expires June 30, 1970

CERTIFICATE

This is to certify that a copy of the foregoing was mailed, postage prepaid, this 12th day of January, 1966, to Clement Theodore Cooper, Esquire, Attorney for Plaintiffs, 918 F Street, N. W., Washington, D. C.

HOLLOWELL AND PITTS

By s/
Vaden S. Pitts

DRIVER'S NAME John W. Hood Mont. 37425

STARTING TIME 7 CAB NO. 59 BADGE NO. 1398

DATE 2-28-64

TIME	FROM	TO	AMOUNT	
7-[illegible]	[illegible]	1746 [illegible] NW	[illegible]	[illegible]
[illegible]	[illegible]	301-C [illegible]	[illegible]	75
7-8	[illegible]	[illegible] NW	[illegible]	50
7-5	[illegible] NW	17[illegible]	[illegible]	75
7-30	[illegible]	[illegible]	[illegible]	100
[illegible]	[illegible]	[illegible]	[illegible]	100
7-30	[illegible] NW	3206 [illegible] NW	[illegible]	[illegible]
10-	[illegible]	4261 [illegible]	[illegible]	100
10-	[illegible]	1150 [illegible]	[illegible]	100
10-20	[illegible]	[illegible]	[illegible]	[illegible]
11	14 & Clifton	314 [illegible]		100
11-20	14th [illegible] NW	[illegible]	11-30	50
11-33	[illegible] Hotel	[illegible]	[illegible]	[illegible]
[illegible]-10	[illegible] B	15 & H [illegible]	[illegible]	[illegible]
12-16	[illegible] Mont	110-30 [illegible]	[illegible]	[illegible]
15-1	64 [illegible] NE	4055 [illegible] NW	5-1	75
[illegible]	[illegible] NW	[illegible] W	[illegible]	50
7-2	[illegible]	7763 [illegible]	[illegible]	135
2-15	[illegible]	9500 Wis	[illegible]	100

Does not have the place of time

(SEE OVER)

PRE-TRIAL CONFERENCE

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VIRGINIA SMITH, as Adminix. of Estate
George C. Smith, deceased & VIRGINIA
SMITH as Adminix. and next friend of
George C. Smith, a minor and Orren W.
Smith, a minor s

JOHN WESLEY HOOD and
DIPLOMAT CAB CO., INC. 147-65

s

May 8, 1967

Action for damages for wrongful death due to negligence.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO:

The P is the duly appointed and qualified Administratrix of the Estate of one George C. Smith who died Feb. 29, 1964. Administration No. 111259 this Court.

On Feb. 28, 1964, at about 2:40 P.M., the streets were wet. George Smith was operating his motor vehicle in a southerly direction on Wisconsin Ave., N. W., Washington, D. C. In front of 1722 Wisconsin Ave. said vehicle was involved in a collision with a motor vehicle owned and operated by D Hood, bearing the color scheme and insigna of D Diplomat Cab Assoc. Inc. (hereinafter Diplomat Cab), which was also traveling south on Wisconsin Ave.

THE PLAINTIFF CLAIMS that the Diplomat Cab cut in front of the decedent's vehicle from left to right and thereby caused the collision

as a result of which George Smith suffered injuries which caused his death at D. C. General Hospital.

The P claims that the accident, injuries, damages and death were caused by the negligence, gross negligence of and violations of D. C. Traffic Regulations by Hood for which both Ds are responsible as follows:

Changing lanes without caution;

Cutting in front of another vehicle;

Failing to give signal or warning of intention to cut to curb to pick up cab passengers;

Failed to give full time and attention;

CLAIMED DAMAGES:

At the time of the accident and death the decedent was a 54 year old male and the sole support of his family. He left his wife, the P Virginia Smith and two minor children who were entirely dependent upon him for support.

decedent
P's/earned approximately $100.00 per week as a taxicab driver and he had a life expectancy of 25 years.

Hospital Bill

Funeral Bill $1,100.00

THE DEFENDANTS assert that the taxicab operated by Hood had pulled to the curb and was in the process of loading passengers when it was struck in the left rear by the decedent's taxicab. They assert that

at the time it was snowing and they deny any negligence or violations of traffic regulations on their part and assert that the collision was caused by the sole negligence of or violations of traffic regulations of George Smith in that he failed to pay full time and attention to his driving; failed to keep in proper lane.

The Ds deny that the death and damages claimed were caused or contributed to by any negligence, act or omission on their part, asserting that the death of P's decedent resulted from natural causes which issue has been judicially determined by the District of Columbia Court of Appeals in collateral litigation brought by the instant P and that such judicial determination should prove dispositive of the issues herein contained. Case No. 3913 D. of C. Court of Appeals, Virginia Smith v Peoples Life Insurance Company - decided August 31, 1966.

The P contends that the decision of the D. C. Court of Appeals settled a collateral issue and that this Court is not bound by that decision.

STIPULATIONS

The parties agree to file with the Clerk of the Court and to mutually exchange, on or before May 25, 1967 a list of the names and addresses of witnesses known to them, including medical and expert witnesses, who

have knowledge of any aspect of this case, indicating those who may be used at the trial. Impeachment witnesses are not to be included.

Counsel for P shall furnish to the Clerk of Court and opposing counsel on or before May 25, 1967, a written statement which will list all special damages which will be claimed at the trial not listed herein, the birthdates of the dependents of decedent and the amounts of contributions made by the decedent to each for two years prior to Feb. 28, 1964.

The following may be admitted in evidence without formal proof, subject to all legal objections: The D. C. Traffic Regulations upon which each party will rely provided a listing thereof is furnished to Clerk of Court and opposing counsel in writing on or before May 25, 1967; bills, hospital records, and death certificate and birth certificates, if initialed by counsel for the parties.

The Examiner has requested counsel to appear at trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

_____
Pretrial Examiner

_____
Clement T. Cooper, Esq., Atty. for P

_____
Baden S. Pitts, Esq., Atty. for Ds

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

VIRGINIA SMITH, 1
As Administratrix of
Estate of George C. Smith, Deceased,
4706 - 5th Street, N. W.
Washington, D. C.
and
VIRGINIA SMITH, 2
As Administratrix and nest friend of
GEORGE C. SMITH, minor
ORREN W. SMITH, minor
4706 - 5th Street, N. W.
Washington, D. C.

Plaintiffs

vs

JOHN WESLEY HOOD, 1
605 Harvard Street, N. W.
Washington, D. C.
and
DIPLOMAT CAB COMPANY, INCORPORATED
a corporation
2336 Georgia Avenue, N. W.
Washington, D. C.

Defendants

Civil Action

No. 147-65

MOTION FOR SUMMARY JUDGMENT

Comes now the defendants and moves this Court for Summary Judgment in the above-entitled cause pursuant to Rule 56 F.R.C.P. and as grounds therefor states:

1. There is no genuine issue of fact involved in this action, and

2. Such other grounds as may be presented at the oral hearing hereof.

HOLLOWELL AND PITTS

By_____
Vaden S. Pitts

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CERTIFICATE

This is to certify that a copy of the Motion for Summary Judgment, with attached Points and Authorities, was mailed, postage prepaid, this 2nd day of August, 1967, to Clement Theodore Cooper, Esquire, Attorney for Plaintiffs, 918 F Street, N. W., (302), Washington, D. C. 20004.

Vaden S. Pitts

POINTS AND AUTHORITIES

1. The inherent power of this Court.

2. Rule 56 F.R.C.P.

3. Smith v. Peoples Life Insurance Company 222 Atlantic 2d 253.

4. This is an action for wrongful death brought by decedent's Administratrix claiming damages for such wrongful death caused by the negligence of the defendants. Assuming arguendo that plaintiff can successfully prove all allegations of negligence alleged by her, the sole issue of fact to be determined is the cause of death of the plaintiff's decedant. The plaintiff in this case instituted an action against Peoples Life Insurance Company (cited above) wherein she claimed the benefits from an insurance policy issued by Peoples Life to plaintiff's decdeant. The only issue in that case was the cause of decedant's death. In order for plaintiff to prevail against defendant insurance company it was incumbent upon the plaintiff to prove that plaintiff's deceased died from "external violent and accidental means". It was judicially determined in that case that death was caused by internal and not external violent and accidental means and recovery was accordingly denied.

It has, therefore, been judicially determined by a Court of competent jurisdiction that plaintiff's deceased died as a result of internal disease and not by accidental means and plaintiff is accordingly judicially estopped to claim otherwise in the instant action.

The fact that defendants in this action were not parties to the earlier litigation is immaterial as the Court stated in Owen v. Simmons 134 Atlantic 2d 92 "under the doctrine of collateral estoppel it is not

necessary that there be an identity of parties in the second action so long as the specific issue has been actually litigated." The main issue in this case is the cause of death of plaintiff's decedant, said cause has been judicially determined and under the doctrine of collateral estoppel the matter has been finally determined judicially and should be dispositive of the instant action.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

VIRGINIA SMITH, 1 As Administratrix of Estate of George C. Smith, Deceased, 4706- 5th Street, N. W. Washington, D. C. and VIRGINIA SMITH, 2 As Administratrix and next friend of GEORGE C. SMITH, minor ORREN W. SMITH, minor 4706 - 5th Street, N. W. Washington, D. C. Plaintiffs	)	
vs	)	Civil Action
JOHN WESLEY HOOD, 1 605 Harvard Street, N. W. Washington, D. C. and DIPLOMAT CAB COMPANY, INCORPORATED a corporation 2336 Georgia Avenue, N. W. Washington, D. C. Defendants	)	No. 147-65

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiffs, by and through their attorney, Clement Theodore Cooper and moves this Honorable Court to dismiss defendants Motion for Summary Judgment and states as grounds therefor the following matter and things:

1. Plaintiffs have raised genuine issues of facts which are controverted and as a matter of law, defendants are not entitled to a Motion for Summary Judgment.

2. Plaintiffs claim is not barred by the Doctrine of Res Judicata.

3. Plaintiffs claim is not barred by the Doctrine of Collateral Estoppel.

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4. For such other and further reasons as will be argued during the hearing of this Motion.

WHEREFORE, Plaintiffs pray that the Motion for Summary Judgment be dismissed.

Clement Theodore Cooper
Attorney for Plaintiffs
918 F Street, N. W. (302)
Washington, D. C. 20004
EXecutive 3-3900

defendant. Defendant was attempting to pick up a passenger at the time when he made a sharp cut in front of decedent.

Plaintiffs contend that defendants were negligent in that, they violated the D. C. Traffic Regulations by : 1. Changing lanes without caution. 2. Cutting in front of another vehicle, to wit, decedents vehicle. 3. Failing to give signal or warning of intention to cut to curb to pick up cab passengers, and 4. Failure to give full time and attention.

As a result of the collision, decedent was taken to Georgetown Hospital and subsequently transferred to D. C. General Hospital on the 28th day of February and died at D. C. General on February 29, 1964. Decedent's cause of death was listed as due to Intracerebral Hemorrhage, right massive, due to ruptured anenuerysm. Plaintiffsthereafter filed this action for damages for wrongful death due to negligence.

Clement Theodore Cooper
Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

VIRGINIA SMITH, 1
As Administratrix of
Estate of George C. Smith, Deceased,
4706 - 5th Street, N. W.
Washington, D. C.
and
VIRGINIA SMITH, 2
As Administratrix and next friend of
GEORGE C. SMITH, minor
ORREN W. SMITH, minor
4706 - 5th Street, N. W.
Washington, D. C.

Plaintiffs

vs

JOHN WESLEY HOOD, 1
605 Harvard Street, N. W.
Washington, D. C.
and
DIPLOMAT CAB COMPANY, INCORPORATED
a corporation
2336 Georgia Avenue, N. W.
Washington, D. C.

Defendants

Civil Action

No. 147-65

MEMORANDUM OF POINTS AND AUTHORITIES

The direct dispositive issue to be first determined here is whether a Motion for Summary Judgment would attain where genuine issues of material facts are raised.

Under Rule 56 of the Federal Rules of Civil Procedure, a Motion for Summary Judgment will attain where there are no genuine and material issues of fact to be controverted. Such is not the case here, however. The question to be determined then, is whether plaintiffs have raised sufficient material facts upon which their cause might proceed to a trial on the merits. Under clear construction of Rule 56 of F.R.C.P., the defendant's motion is groundless for the reason that plaintiffs have alleged

in their complaint, certain allegations, and their contention of facts must be accepted as true, and they must be given the benefit of the most favorable inference which reasonably can be drawn. Jeffrey v. Whitworth College, 128 F. Supp 219 (1955). Courts have held, time and time again, that a Motion for Summary Judgment may not serve as a substitute for a trial of disputed issues of material facts. Yokem v. Griffith, 167 F. Supp. 120 (1958). Plaintiffs have submitted herewith, their statement of facts which are genuine on their face and these facts being controverted, cannot be tried by way of Motion for Summary Judgment unless this Honorable Court feels that the underlying principles inherent in the 7th Amendment of the Federal Constitution are diminished in their effect when tested by Rule 56 of the F. R. C. P. Convenience in procedure does not render operation of Amendment 7, Fed. Constitution, nugatory. Thus, the defendant's Motion for Summary Judgment does not attain.

Defendants have grounded their Motion for Summary Judgment upon disposition of litigation in Smith v. Peoples Life Insurance Company, 222 Atl. 2d 253, which was an action to recover on a life insurance policy. The present action, which defendants clearly agree, is one for wrongful death resulting from an automobile accident in which plaintiff's decedent was killed. In Smith vs. Peoples, supra, the District of Columbia Court of Appeals affirmed a judgment in favor of the defendant. However, that judgment does not bar the present action for wrongful death for the reason that Smith vs. Peoples, supra, did not dispose of all of the crucial issues inherent in the present action. Inorder to clear away the underbrush or obstructions which would prevent taking direct assault

upon the issues raised in defendants motion, this Honorable Court should take notice that the holding in Owen v. Simmons, 134 Atlantic 2d 92, is not binding upon this Court inasmuch as the District of Columbia Court of Appeals is an inferior Court and this Court is not bound by its decisions nor does this Honorable Court need follow such a decisions for whatever degree of persuasion the decision would afford. Thus, we are brought to grips with the critical issues here: (1) Whether plaintiffs action for wrongful death is barred by the Doctrine of Res Judicata? (2) Whether or not plaintiffs action for wrongful death is rendered null and void under the application of collateral estoppel?

1. Under the Doctrine of Res Judicata, a claim is forever barred if issues have been decided by a court of competent jurisdiction. Inorder for the doctrine of Res Judicata to apply, the Court deciding the issue must have had jurisdiction; there must be indemnity of the subject matter of the action; the cause of action must be identical; the parties must be identical in the capacity in which they are sues; there must be a final determination of the issues; on the merit; upon the particular issue, but the adjudication is final upon every matter which might have been litigated under the original cause of action.

In Smith vs. Peoples Life Insurance Company, the action was one for recover on a life insurance policy and not one for wrongful death as is the present action. Additionally, the District of Columbia Court of General Sessions had no jurisdiction to try a wrongful death action where damages are claimed in excess of $10,000, unless the cause had been certified to that Court from the U. S. District Court.

The cause of actions are obviously not identical and obviously, the parties are not identical in their capacity to sue. The distinguishing feature is that the parties defendant in both actions are different while plaintiff in both actions is one and the same person. The cause decided in Smith vs. Peoples, supra, was not, by a far stretch of the imagination, a judgment on the merits. There was judgment on the merits as to whether plaintiff could recover under a life insurance policy. The issues of negligence, proof of causation, and damages were not litigated in the life insurance suit. Under the Restatement of Judgments:

" #68

(1) . . . . . .

(2) a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action. "

See also, Scott, "Collateral Estoppel by Judgment, " 56 Harvard L. Rev. (1942).

As to jurisdiction, the Restatement of Judgments further adds,

" #71 Where a court has incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action brought to determine the matter directly. "

Thus, it cannot be held that plaintiffs present action is barred by the doctrine of res judicata.

II. Defendants raise the doctrine of collateral estoppel in view of their position that 'cause of death of plaintiff's decedent' was the main

issue in the original case. Plaintiffs take a contrary position however. There are several issues to be determined here, that is, in the wrongful death cause. Firstly, the question of negligence must be overcome. Secondly, the causation factor must be directly and positively proven. Thirdly, the question of damages resulting from wrongful death must be proven. These issues were not tried in Smith vs. Peoples Life Insurance, supra. The judgment is not conclusive as to questions which have been but were not litigated in the original action. This is the underlying basis of the doctrine of collateral estoppel. No better language is found to resolve the question of application of collateral estoppel, other than the Restatement of Judgments, paragraph 70, it is stated:

> "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties is a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction and in any event it is not conclusive if injustice would result."

In view of the fact that questions of law were not litigated in the original action and those questions must be determined here, the conclusion is inescapable that the plaintiffs cause is not barred by the doctrine of res judicata nor by the doctrine of collateral estoppel.

Clement Theodore Cooper
Attorney for Plaintiffs
918 F Street, N. W (302)
Washington, D. C. 20004

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CERTIFICATE OF SERVICE

Copy of foregoing pleadings mailed, postage prepaid, to Law Offices, Hollowell & Pitts, 1513 P Street, N. W., Washington, D. C. this 7th day of August, 1967.

Clement Theodore Cooper
Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

VIRGINIA SMITH,

Plaintiff,

v.

JOHN WESLEY HOOD, ET AL,

Defendants.

Civil Action 147-65

Washington, D. C.

September 8, 1967.

The above cause came on for hearing of motion before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

Appearances:

For the Plaintiff:

CLEMENT T. COOPER, ESQ.

For the Defendant:

VADEN S. PITTS, ESQ.

- - -

P R O C E E D I N G S

THE DEPUTY CLERK: Smith v. Hood.

THE COURT: What is this matter?

MR. PITTS: This is a motion for summary judgment, Your Honor, brought on behalf of the defendants.

THE COURT: We will take our usual mid-afternoon recess at this time and then I will hear you after the recess.

(Recess.)

MR. PITTS: May it please the Court, my name is Vaden Pitts. I represent the defendants in Civil Action 147-65 entitled Smith, Administratrix vs. Hood and Diplomat Cab Company.

I appear on behalf of the defendants with a motion for summary judgment against the plaintiff administratrix and in her capacity individually.

The facts of the case before the Court is one for damages for wrongful death. The plaintiff --

THE COURT: What is the basis of the motion?

MR. PITTS: Collateral estoppel with reference to a decision issued from the District of Columbia Court of Appeals from a trial finding by a General Sessions Trial Judge.

This was a routine automobile accident case under

questionable circumstances. For the purposes of this argument only we will concede negligence and suggest to the Court in our motion that the second question in the case, namely, whether or not the deceased died wrongfully or died of natural causes, has been judicially determined and therefore the plaintiff is estopped to further assert this claim against these defendants.

In this case there was a minor automobile collision. The driver, the decedent in the case, was transported to the hospital and expired within 48 hours. The administratrix filed an action against the defendants, the owner and operator of the taxicab in question, alleging that the death resulted from injuries inflicted as a result of the negligence of the defendants.

While this case was pending the plaintiff, as administratrix, instituted an action in the Court of General Sessions naming as defendant Peoples Life Insurance Company, and the basis for that suit was that the deceased was a policy holder of an industrial accident policy, wherein the defendant insurance company in that case was obligated to pay the deceased the principal sum of the policy if his death resulted from accidental means.

The only issue, as the Court stated in the Court

of Appeals decision --

THE COURT: Have you got the Court of Appeals decision here?

MR. PITTS: I have the advance sheet, Your Honor.

THE COURT: Yes, that is good enough.

MR. PITTS: As the Court stated in that decision, the sole question in that trial before the Trial Judge and again on review in the Court of Appeals, was whether or not the deceased died of accidental means or died of natural causes as the defendant insurance company claimed.

The Trial Court found that, number one, there was no injury inflicted in this accident and, number two, that he did not die of accidental means.

We thus conclude, arguendo, that the only issue in this case at this time is whether or not the decedent died wrongfully as alleged.

THE COURT: You don't claim res judicata.

MR. PITTS: Not specifically.

THE COURT: Because the parties are not the same.

MR. PITTS: We claim estoppel by judgment, and we feel that since the only issue before the Court in this case has already been judicially determined, we feel that summary judgment should be granted.

THE COURT: I will hear the other side.

MR. COOPER: May it please the Court, my name is Clement T. Cooper. I represent the plaintiffs in this action.

First of all, I would like to point out to the Court that the original case over in the District of Columbia Court of General Sessions was not one brought by plaintiff in her administrative capacity. She brought that action as the plaintiff in her individual capacity and as beneficiary under the terms of that policy.

We contend in this summary judgment opposition that the plaintiffs have raised a genuine issue of fact and the doctrine of res judicata --

THE COURT: What is the genuine issue of fact? If you have raised a genuine issue of material fact, that ends the matter here. What are the genuine issues of material fact?

MR. COOPER: First of all, in this action filed in this court, this is an action for wrongful death and we base this action on the grounds of negligence. In order to recover in this particular action we must first overcome three obstacles. One, we must overcome the obstacle of proving the negligence; two, proving the causation factor; and third --

THE COURT: You said a moment ago there are genuine issues of material fact. What are the issues?

MR. COOPER: The issues are set forth in my statement which is attached to the opposition and attached to the memorandum in the motion. The defendants' attorney has stated the facts more or less, but I will give them to the Court again.

The plaintiff was duly appointed administratrix of the estate of her husband --

THE COURT: What is your point? What point are you trying to make?

MR. COOPER: My point is that the defendants have denied that there was any negligence. We assert that there is negligence, so there is an issue of fact.

THE COURT: They say it has been established that the death of the deceased was not caused by anything that happened in the accident. If that is so, it is immaterial whether there was negligence or not. What do you say about that?

MR. COOPER: I would say to that, Your Honor, I think the death of the decedent as it would apply to this action was incidental, as it was determined in the General Sessions Court action on the insurance policy.

I refer the Court to the Restatement of Judgments and I quote Section 71: "Where a court has incidentally

determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action brought" --

THE COURT: Of course that is correct. Don't waste my time reading me that because it has nothing to do with this case. If the Court had no jurisdiction, then of course there is no collateral estoppel.

One of the issues in the case pending in General Sessions against the insurance company was whether this was an accidental death or a natural death, as I understand it. The Court in that case held that this was a natural death and not an accidental death and that the accident was not a cause of death.

MR. COOPER: That is what that Court held, Your Honor --

THE COURT: Why isn't that binding here?

MR. COOPER: It is not binding here for the simple reason that the plaintiffs in that action did not offer or tender all the proof she will offer in this particular action.

THE COURT: That doesn't make any difference. I am afraid you misunderstand the doctrine of estoppel.

The only thing that bothers me, Mr. Pitts, and I

notice you don't mention that in your points and authorities, whether collateral estoppel applies in a case where a person is suing in two different actions in two different capacities??

MR. FITTS: During the lunch hour I did some last minute research because this case was preliminarily prepared by a law clerk, and I ran across several circuit court decisions and I will direct Your Honor's attention to one that I found eminating from the Sixth Circuit entitled Davis v. McKennon et al, which generally -- and I will have to rely somewhat on my hurried memory from the noon recess -- it was a case where a plaintiff who had been injured in an accident had sued a defendant automobile operator and recovered a judgment. Upon the failure of the insurance carrier to pay the judgment he instituted a suit against the insurance carrier to enforce collection of the judgment. There was a trial on the merits, some allegations of fraud were alleged. Trial was had in the state court level in Ohio on that issue and was determined adversely to the claimant. Subsequently, the same claimant instituted suit against agents or employees of the insurance company concerned, again attempting to litigate the issue of fraud in termination of the insurance policy. With that brief background, I would like to read from the opinion.

THE COURT: The question is what happens if two suits are brought by the same plaintiff in different capacities, because she sued the insurance company in the Court of General Sessions in her individual capacity as beneficiary of the policy, here she is suing as administratrix. Does collateral estoppel apply? Do you have any cases as to the application of collateral estoppel under those circumstances?

MR. PITTS: Unfortunately, I do not.

THE COURT: That is the only point I was in doubt on for a moment.

MR. PITTS: The general language, which is probably more than 100 years old, is that it is binding on parties litigating and their privies.

I am sure this is the same individual, so there would be some privy concerned.

THE COURT: I am going to grant the defendants' motion for summary judgment because this issue was adjudicated in the other suit and the doctrine of collateral estoppel applies.

- - -

Certified as the official transcript of proceedings.

Official Reporter

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

VIRGINIA SMITH, As Administratrix of Estate of George C. Smith, Deceased, and VIRGINIA SMITH, As Administratrix and next friend of GEORGE C. SMITH, minor ORREN W. SMITH, minor Plaintiffs	)	
v	)	Civil Action
JOHN WESLEY HOOD and DIPLOMAT CAB COMPANY, INCORPORATED Defendants	)	No. 147-65

O R D E R

This matter came on for hearing before this Court on September 8, 1967 on motion of the defendants for summary judgment and upon consideration of the record herein and oral argument of counsel in open Court, it is by the Court this_____day of September, 1967,

ORDERED that the motion for summary judgment be, and the same is hereby granted.

_____
J U D G E

No objection as to form

_____
Clement Theodore Cooper
Attorney for Plaintiffs

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CERTIFICATE

This is to certify that a copy of the foregoing Order was mailed, postage prepaid, this 11th day of September, 1967, to Clement Theodore Cooper, Esquire, Attorney for Plaintiffs, 918 F Street, N.W., Washington, D. C. 20004.

Vaden S. Pitts
Attorney for Defendants

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NOTICE OF APPEAL. 73 (B)

United States District Court for the District of Columbia

VIRGINIA SMITH, ET . AL.,
Plaintiff.

vs.

DIPLOMAT CAB CO. INC. ET AL.
Defendant.

CIVIL No. 147-65

NOTICE OF APPEAL

Notice is hereby given this 26th day of September, 1967, that VIRGINIA SMITH, Et Al, Plaintiff in the above cause, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of September, 1967 in favor of Diplomat Cab Company, Inc., Et. Al, Defendants against said Virginia Smith, Et. Al.

Attorney for Plaintiffs

~~918 F Street, N. W. (302)~~
Washington, D. C. 20004

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21399

VIRGINIA SMITH, *Appellant*

v.

JOHN WESLEY HOOD

and

DIPLOMAT CAB COMPANY, INC., *Appellees*

Appeal from the United States District Court for the District of Columbia

VADEN S. PITTS
DONALD D. WIKE
1513 P Street, N. W.
Washington, D. C. 20005
Attorneys for Appellees

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTION PRESENTED

In the opinion of Appellees, the one and only question presented is:

(1) Whether the doctrine of collateral estoppel applies to bar a suit for damages for wrongful death where, during the pendency of such suit, there is a judicial determination in an action brought by the same party that the deceased died of natural causes.

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* Cases chiefly relied upon are marked by asterisks.

IN THE

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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and

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, Virginia Smith, sued Appellees below, in her capacity as Administratrix of her late husband's estate and also individually as next friend of their infant children. Her complaint sounded in tort and was entitled "Complaint for Damages—Wrongful Death." She claimed, inter alia,

that by reason of defendant's negligence, her late husband suffered bodily injuries resulting in his death. (J.A. 1).

While this action was pending below, Appellant, as beneficiary of an industrial accident policy, sued the insurance company in District of Columbia Court of General Sessions. The sole issue in that case was whether the insured (Appellant's husband) died from bodily injury sustained through accidental means. From an adverse ruling by the Trial Court, Appellant sought reversal in the District of Columbia Court of Appeals. This latter Court upheld the lower Court in its decision rendered August 31, 1966. (*Smith* v. *Peoples Life Insurance Company,* 222 A. 2d 253).

Subsequently, on May 8, 1967, the instant case was called for a pre-trial hearing and the Pre-Trial Examiner's Order was duly filed. (J.A. 16). This Order specifically recites the Peoples Life Insurance Company decision and its claimed dispositive effect on the case at bar.

In due course, Motion for Summary Judgment was filed with the Court below in accordance with its applicable rule. Upon review of the Peoples Life Insurance Company decision, the Motions Judge granted defendants' Motion for Summary Judgment on the theory of collateral estoppel. From this ruling, Appellant brings this appeal.

SUMMARY OF ARGUMENT

Appellant who litigated issue of the cause of her husband's death in the District of Columbia Court of General Sessions is estopped by judgment from relitigating the same issue in another action against different defendants. The doctrine of collateral estoppel applies as the Appellant was the plaintiff in both actions, or her status in one was in privity with her status in the other. It is not necessary that the parties be identical for the doctrine to apply. Since the issue was once litigated and a final judgment rendered, and Appellant was a party, or privy to, the prior action, she is estopped from relitigating the same issue again.

ARGUMENT

One who litigates a specific issue, namely, was death caused by natural or unnatural means, cannot relitigate the same issue in another Court on the principle of collateral estoppel.

Appellant in her complaint filed below sought damages for her late husband's estate and for herself individually as next friend of her infant children. She alleged that Appellees herein were negligent and said negligence caused certain bodily injuries to her late husband which in turn caused his death. By reason of such wrongful death, she seeks compensation both individually and in her capacity as Administratrix.

Broken down into its basic parts, her cause of action left three phases for determination. Firstly, negligence; secondly, cause of death; and, thirdly, damages. If either of these three elements are legally deficient, then Appellant could not recover. In this instance the second, cause of death, was by judicial determination removed from the realm of question of fact and her cause of action accordingly failed.

While Appellant's case was pending in the lower Court, she litigated the issues recited in *Smith* v. *Peoples Life Insurance Company*, 222 A. 2d 253. The only factual issue before the Trial Court in that case was whether Appellant's husband died of accidental means. Appellant, through her counsel in this case, introduced evidence through a doctor that death was caused by a massive intercerebral hemorrhage and that there was no indication of external trauma. On this evidence the Trial Court ruled that the deceased died by reason of such hemorrhage and not by accidental means. As the District of Columbia Court of Appeals said, "We find no showing that the active procuring cause of (his) death was sustained through external, violent and accidental means."

A reading of this decision warrants but one conclusion. The sole issue before the Court was the cause of death of Appellant's husband. This issue has been litigated by Appellant and this issue has been determined judicially.

Inasmuch as this issue has been determined, Appellant's cause of action must fail as one of its essential elements is lacking. On this premise it becomes moot whether Appellees were negligent, or whether Appellant sustained damage. As the Motions Judge stated, "They say it has been established that the death of the deceased was not caused by anything that happened in the accident. If that is so, it is immaterial whether there was negligence or not." (J.A. 39).

Contrary to counsel's assertion on page 13 of Appellant's brief, liability was never admitted by defendants. Counsel's statement is as follows: "*For the purposes of this Argument only* we will concede negligence." The import of this statement should be clear to counsel. Such procedure has been utilized expediently in legal proceeding from time immemorial. It is submitted that Appellees are not liable, they have not, nor will they ever concede negligence other than for the purpose as herein above stated.

In this procedural posture, the lower Court could properly consider Appellee's motion. If the Appellant was estopped by the judgment in the Peoples Life Insurance Company case to further litigate her husband's cause of death, there were no material questions of fact remaining and summary judgment could properly be granted.

A Motion for Summary Judgment is available to raise the issue of collateral estoppel. *Graves* v. *Associated Transport, Inc.*, 344 F. 2d p. 895-896; *U.S.* v. *United Air Lines*, 216 F. Supp. p. 718; and cases cited therein. The propriety of the Motion Court's action in this regard being settled, the only issue remaining is whether the doctrine of collateral estoppel was properly applied in this instance.

Notwithstanding the hundreds of decisions on this question, Appellant relies only on Restatement of Judgments, to support her view.

Her first objection is that in the Peoples Life Insurance Company case, she sued in her individual capacity, and below, she is suing as Administratrix. (Apparently overlooking Count II of her complaint). She states the doctrine of collateral estoppel is operative where the second action is between the same parties who were parties to the prior action (Appellant's Brief, p. 9). It is noted that no authority is cited for her proposition.

Mutuality of parties as a prerequisite for invoking the doctrine of collateral estoppel has been abandoned by our Courts. The doctrine is now available defensively without mutuality. *Graves* v. *Associated Transport, Inc.*, 344 F. 2d p. 895. In *Owen* v. *Simons*, 134 A. 2d 92, the Court said, "Under doctrine of collateral estoppel, it is not necessary that there be an identity of parties in the second action so long as the specific issue has been litigated." Nor is it necessary that the prior suit be based on the same cause of action. *Lawler* v. *National Screen Services Corp.*, 349 U.S. 322. Such prior judgment precludes relitigation of issues actually litigated and determined in the prior suit. The doctrine was applied by this Court in a case where the second cause of action was different and which named defendants who were not parties to the prior suit. (*DaBobula* v. *Goss*, 90 U.S. App. D.C. 28). The Court applied the doctrine on the basis that the factual issue forming the premise for the second action had been judicially determined. Another instance of application of the doctrine where the proponents were not parties to the prior action is *U.S.* v. *United Air Lines*, 216 F. Supp. 709, cert. dismissed 379 U.S. 951. See also *Zdanok* v. *Glidden Company*, 327 F. 2d 944.

The overwhelming authorities in the United States now have abandoned the requirement of "mutuality" and now

hold that one not a party or privy to a judgment may nevertheless assert the judgment against one, or his privy, who participated in the judgment. One of the leading opinions on this topic was authored by Chief Justice Traynor of the California Supreme Court in *Bernhard* v. *Bank of America National Trust and Savings Association,* 122 P. 2d 892. This opinion was quoted by the Courts in the Zdanok and Graves, decisions, *supra.*

Many Courts applying the doctrine have rested their decisions flatly on a declaration of public policy that having litigated an issue once, there is no sound reason to permit it to be relitigated when a new adversary can be found. A party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case. *Bruszewski* v. *U.S.,* 181 Fed. 2d 421.

In this instance, Virginia Smith, Appellant, was the plaintiff in the prior action wherein the sole factual issue for determination was the cause of death of her husband. Virginia Smith is the plaintiff in the second action and the only factual issue in its posture when before the Motions Judge was the cause of death of her husband. To say she was not a party, or privy, to the second action because in Count I thereof she added "Administratrix" after her name would be a travesty on logic. To say Virginia Smith was not privy to Virginia Smith, Administratrix, is like saying there is no privity between executor and the testator, administrator and the intestate, the heir with the ancestor, etc. As Justice Traynor said in the Bernhard decision, *supra,* "Where a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other." (citing cases)

In both actions the ultimate goal was the same, personal monetary gain by Virginia Smith based on wrongful death of her husband. In both actions she had the initiative to prove her husband died by wrongful or accidental means. She has had a full and fair opportunity to litigate the issue effectively. The sole issue decided in the prior suit is identical with the one presented in the second suit. There has been a final judgment on the merits of this issue. Appellant was a party (or in privity with a party) in the prior suit. Under the overwhelming weight of authority, her second suit is subject to dismissal by applying the doctrine of collateral estoppel by judgment and the ruling of the lower Court should be upheld.

Appellant further argues, "The mere fact that an issue of law was litigated and determined does not preclude her litigating the same question of law in the action filed below". The very elementary response to this is that an "issue of law" was not litigated in the prior suit. On the contrary, an issue of fact was adjudicated and because of its determination, the lower Court properly granted summary judgment.

Though Appellees contend there is but one question presented on this Appeal and their efforts have been directed toward this point, they would feel remiss in not acknowledging the other points raised by Appellant.

Part II of her argument (Appellant's Brief p. 11) can be answered summarily by pointing out that the doctrine of *res judicata* was not the basis of Appellees' motion below, it was not relied on by the Motions Judge and is not a part of this Appeal.

With reference to Part III of Appellant's argument (Appellant's Brief p. 13) Appellees are totally unfamiliar with the jurisdictional powers of this Court to consider motions for summary judgment, particularly when judgment has already been entered against the moving party at

the trial level. Appellant's attention is respectfully called to the distinction between a concession of negligence and an admission of liability for the purposes of arguing a motion.

Part IV of Appellant's argument (Appellant's Brief p. 15) contains a generally accurate recitation of Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure, however, it has no relevancy to the question on Appeal. To reiterate, the doctrine of *res judicata* has no bearing on the question before this Court. It would be ludicrous indeed to presume that Appellees should incorporate in their Answer the defense of collateral estoppel based on a decision which was to be rendered nearly two years later.

Respectfully submitted,

VADEN S. PITTS
DONALD D. WIKE
1513 P Street, N. W.
Washington, D. C. 20005
Attorneys for Appellees